Supreme Court, U.S.
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No. 04-1375

IN THE

Supreme Court of the United States

SAMUEL GLAZER,

Petitioner,

v.

LEHMAN BROTHERS, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

RESPONDENT COWEN & COMPANY'S BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Cowen & Company n/k/a Financial Square Partners, L.P. states that it has no parent company, and that there is no publicly-held company that owns more than 10% of Respondent.

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RESPONDENT COWEN & COMPANY'S BRIEF IN OPPOSITION

Petitioner Samuel Glazer has never sued Cowen & Company ("Cowen"), yet he involves Cowen in the Petition because he seeks review of a decision two years ago from the Sixth Circuit to which Cowen was a party. As described below, it is improper under these circumstances to obtain the belated review that Mr. Glazer desires, and, in any event, the Petition does not present a question worthy of this Court's attention. Cowen files this opposition only as to the first question presented in the Petition because the latter two questions do not implicate Cowen.

STATEMENT OF THE CASE

After revelations came to light about a rogue broker who formerly worked for Cowen and other brokerage firms, a wave of lawsuits ensued. Seven groups of plaintiffs filed in the Northern District of Ohio in cases that were ultimately assigned to the same district judge. The lead plaintiffs in the seven cases were Samuel Glazer, Robert Fazio, Dominic Visconsi, Peter Spitalieri, Richard Lopardo, Thomas Savoca, and Peter Bonutti. Other family members and some trusts joined the lead plaintiffs in their respective cases. Cowen was only named as a defendant in five of the cases: Fazio, Visconsi, Lopardo, Savoca, and Bonutti.

Defendants moved to compel arbitration based on arbitration agreements executed by the plaintiffs. The district court, however, denied this application, reasoning that the broker's fraud was so complete as to render the contracts void *ab initio*.[1] In the district court's view, a contract claimed to

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[1] The district court also held that the issues in the case were beyond the scope of the arbitration provision. (Pet. App. 79-85). The Sixth

be void *ab initio* could not be arbitrated because a valid arbitration clause could not arise from such a contract.

In the *Fazio* decision, (Pet. App. 31), however, the Sixth Circuit reversed, relying in large measure on *Burden v. Check into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002) and other Sixth Circuit securities cases. *Burden* held that allegations that a contract is void do not defeat arbitrability because the arbitration clause is examined separately under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). After applying that rule, the *Fazio* court remanded only because "some parties raise[d] issues specific to their arbitration agreements and because the record below is undeveloped in this regard. . ." (Pet. App. 47).

Not all parties had such issues. The Savocas settled on the eve of oral argument in *Fazio*, and the Fazios and Visconsis proceeded to arbitration without an evidentiary hearing.

The remand only concerned any issues specific to the arbitration clauses themselves. In light of *Fazio*, the district court could no longer entertain attacks on the entire contract. Therefore, Petitioner's case after remand did not implicate the rule of law articulated by the Sixth Circuit in *Fazio*; instead, he was seeking to exploit exceptions to that rule based on the arbitration clause itself. Cowen expects the Respondents who were actually parties to these proceedings to elaborate on the subsequent procedural history.

REASONS FOR DENYING THE PETITION

Cowen generally relies on the arguments of the other Respondents that were actually parties to the most recent Sixth Circuit case as to why certiorari should be denied.

Circuit reversed on this ground as well, and Petitioner does not challenge this aspect of the court's decision.

However, it writes separately to emphasize a few points germane to the *Fazio* decision.

1. This case presents a poor vehicle to review the void-voidable question because it does not offer a genuine "void" contract scenario. Petitioner invites review of *Fazio* based on a claimed conflict in which some courts hold that allegedly void contracts must be arbitrated, whereas others find that the matter is for the court. Yet void contract cases as highlighted in the Petition generally involve situations where one party seeks to avoid arbitration by arguing that the contract is void because it violates state law. Typical examples include contracts that contravene state usury or licensing laws. The party resisting arbitration thus argues that because the contract is illegal or void, no valid agreement to arbitrate could arise from it.

The *Fazio* facts do not, however, fit that pattern because they present, at best, a *voidable* contract. The plaintiffs did not argue that the brokerage contracts themselves were illegal or violated any state law. Indeed, these were standard contracts used every day in the securities industry. Rather, they sought to argue that because the broker did not intend to honor them and because his fraud was so pervasive, the agreements were void. As the Sixth Circuit explained, "[t]he district court held that, because the money in the accounts was largely stolen and Gruttadauria had no intention of acting as a true broker for the plaintiffs, no account agreements really existed, thus making the agreements void *ab initio* and invalidating the arbitration clauses." (Pet. App. 40). Such alleged facts, however, display the hallmark attributes of *voidable* rather than *void* contracts.

All of the defendants argued before the Sixth Circuit that plaintiffs' allegations would establish only the contracts at issue were voidable, not void, rendering this an easy case under *Prima Paint*. They argued this before the district court as well, but the court exhibited substantial confusion

regarding the distinction between void and voidable contracts. On appeal, the Sixth Circuit had no need to dwell on that issue because even if the contracts could be characterized as void, *Burden* dictated the outcome.

There is thus a substantial likelihood that, if this Court granted certiorari, it would determine, as defendants have consistently maintained, that the contracts are not void, which would bring the case squarely within the confines of *Prima Paint* and trivialize any importance that this case might have.

2. *Fazio* is also a poor vehicle for certiorari because the decision is stale. This Court should not exercise certiorari over a decision issued two years ago when parties to that decision are no longer involved in the present case, and yet their rights could be impacted by this Court's disposition. Mr. Glazer apparently believes that this Court can undertake review over *Fazio* because it was interlocutory in nature by virtue of the remand by the Sixth Circuit.

In *Fazio*, however, the court applied a specific rule of law to reverse the district court's denial of arbitration. The remand had nothing to do with the rule of law that the Sixth Circuit invoked. Instead, the court recognized that "some parties" raised other issues regarding forgery and other signatory power questions on which the record was not adequately developed. (Pet. App. 47-48).

Fazio was final as to the "void" contract issue that it decided, and it proved final to at least two sets of plaintiffs on the arbitration issue. The Visconsis and Fazios did not convene a hearing before the district court as the Sixth Circuit permitted, but instead went straight to arbitration. Thus, not only did *Fazio* prove final to certain plaintiffs, even if it could otherwise be characterized as interlocutory, "where. . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern, *et*

al., SUPREME COURT PRACTICE, § 4.18 (8th ed.). Certiorari should have been requested, if at all, in 2003 when the Sixth Circuit issued *Fazio*.

3. It should also be noted that the Sixth Circuit in *Fazio* simply applied *Prima Paint* as interpreted by *Burden*, a decision that this Court declined to review. In *Burden*, the court applied *Prima Paint* to direct a dispute concerning the legality of an agreement under state law to arbitration. Although plaintiffs insisted that a valid agreement to arbitrate could not arise from a void contract, the Sixth Circuit distinguished their authority as concerning questions of "signatory power." *Id.* at 490. When the matter did not involve assent, but rather the content of the underlying contract, *Prima Paint* required arbitration. *Id.* at 490-91. Both the Eleventh and Fourth Circuits have expressly followed the Sixth Circuit's *Burden* decision. *See Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir.), *cert. denied,* 537 U.S. 1087 (2002) (recognizing that its holding was "squarely in accord with the Sixth Circuit's recent and well-reasoned decision in *Burden*. . .").

Burden thus made *Fazio* an easy decision – because binding Sixth Circuit authority dictated the outcome on the void contract question, there was no need for the Sixth Circuit to devote time in *Fazio* to determining whether the contract was voidable or void, and if the latter, whether allegedly void contracts could be arbitrated. *Fazio* thus broke no new ground and was compelled by binding precedent, which again militates against certiorari.

4. Petitioner greatly overstates the extent of any split of authority. He trumpets the "split" purportedly recognized in *Burden*, but that was not a true split, which may explain why this Court declined certiorari. *Burden* distinguished, rather

than disavowed, the authority involving "signatory power" or questions of assent.

Petitioner also misunderstands an entire line of cases to which he points as evidence of a split. These "signatory power" cases are a series of federal circuit decisions recognizing that when contractual assent is challenged (such as in a claim of forgery), the parties cannot be compelled to arbitrate until the court determines whether they in fact assented to the contract. *See Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136 (9th Cir. 1991) (claim that agent lacked authority); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) (claim that agent lacked authority). Contracts implicating assent, however, place the "making of the agreement for arbitration," 9 U.S.C. § 4, in issue, unlike contracts alleging violations of state law, which instead raise questions about the merits of the dispute. That is precisely why the Circuits that have considered the issue have refused to extend the signatory power cases to all void contracts. *See Burden*, 267 F.3d at 490-91; *Bess v. Check Express*, 294 F.3d 1298, 1305-06 (11th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637-38 (4th Cir. 2002).

Much of the contrary "authority" referenced by Petitioner are actually signatory power cases, thus further belying a split. *See, e.g., Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26 (2d Cir. 2001) (question of whether agent had authority – *i.e.*, signatory power – to bind principal). And the cases that are not signatory power cases further confirm that *Fazio* is inapposite because they deal with contracts that purportedly violate state law because of their subject matter. *See, e.g., Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005) (contracts claimed to be void because they violated state usury law). *Fazio* thus does not contribute to any split, because it is independent of the authority arrayed in the Petition.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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